

a. *The Commission Should Include the South Carolina Tax Since All Cost Components Reflect The Market Cost Of Waste Disposal*

It is reasonable to include the South Carolina tax because it represents the market price for low-level waste disposal. As ComEd's witness, Thomas LaGuardia testified in ICC Docket No. 99-0115, many jurisdictions have used the price for low-level waste disposal at the Barnwell facility as a proxy for low-level waste burial costs. ICC Docket No. 99-0115, Tr. 610. In this case, ComEd did not perform a 1999 study for costs of low-level waste disposal but rather used the study done by Jene Vance in ComEd's 1997 decommissioning petition, ICC Docket No. 99-0117. ICC Docket No. 00-0361, Cook County Cross Ex. 7, (*See Appendix to this Brief*). Jene Vance's cost estimate for low-level waste disposal at an Illinois facility was almost the same as what Barnwell charged in 1996 dollars. ICC Docket No. 99-0115, Tr. 611-612, 1083-1084; ICC Docket No. 00-0361, Cook County Cross Ex. 7. Therefore, ComEd's exclusion of the South Carolina tax skews the price for low-level waste. For example, if one were to estimate the cost of gasoline escalation, the costs would include federal, state and local taxes. It is nonsensical to exclude the various taxes imposed on gasoline in attempting to estimate the cost of escalation for a consumer.

Consequently, although the South Carolina tax arguably may be inapplicable for an Illinois facility, the entire Barnwell cost including its tax represents the market price for low-level waste disposal. ICC Docket No. 99-0115, Tr. 611-612. Although the waste tax is arguably discretionary on the part of South Carolina, it reflects how much the cost the market will bear. ComEd's exclusion of the tax distorts the market cost for low-level waste and consequently causes an inflated escalation rate. ICC Docket No. 99-0115, Tr. 1063.

Lastly, ComEd raises the fact that the Barnwell facility will soon close. ICC Docket No. 00-0361, ComEd Ex. 12 at 27. ComEd and Staff witness Riley indicate an Illinois facility may not be built in time to handle low level waste disposal. ICC Docket No. 00-0361, ComEd Ex. 12 at 27, Tr. 515. Yet, the record shows that 1) ComEd bases its estimates on an assumption that an Illinois waste disposal facility will be built and burial charges will be \$364 per cubic foot (1996 dollars); ICC Docket No. 00-0361, TSL-2 at 6-2, ComEd Ex. 12 at 25; 2) a low level waste facility at this time is not economically viable due to the low volumes of waste; ICC Docket No. 00-0361, Tr. 535, 538; 3) the Illinois legislature determined that a low level waste facility was not necessary until the year 2012; ICC Docket No. 00-0361, Tr. 538; and 4) the low level waste disposal facility in Utah may be an alternative for disposal; ICC Docket No. 00-0361, Tr. 280. So assuming Utah's disposal site is considered as a proxy for low level waste disposal, then whatever price Utah charges will be the cost for disposal including any applicable taxes. Currently, low-level waste disposal for Utah is approximately \$80 per cubic foot. ICC Docket No. 00-0361, Tr. 541.

b. The Commission should not allow ComEd to arbitrarily deviate from the terms of Rider 31

NUREG 1307 does not remove waste disposal taxes; it removes surcharges.⁵ In the 99-0115 proceeding, Mr. Berdelle testified that he had contacted the NRC to find out why the South Carolina tax was not known and measurable from NUREG 1307. He only knew the amount of the South Carolina tax because of ComEd's monthly waste shipments to South Carolina. ICC Docket No. 99-0115, Tr. 1094-1095. In addition, the Commission affirmed Mr. Vance's low-level waste cost estimate of \$364 per cubic foot for an Illinois facility in ICC Docket No. 97-

⁵See ICC Docket No. 99-0115; Cook County Cross Exhibit 33, Table 2.1, (See Appendix to this Brief).

0110. The Commission specifically stated that they could not accept the Barnwell facility less the South Carolina tax as a proxy for an Illinois facility. ICC Docket No. 97-0110, Order at 9.

If ComEd and Staff included the South Carolina tax pursuant to NUREG 1307, the reasonable low level waste escalation rate in this proceeding is 9.19% and not the 22.44% assumed by Berdelle or 10% as determined by Staff's arbitrary bandwidth approach. With a 9.19% low-level escalation rate, the overall escalation rate should be 4.63%. ICC Docket No. 99-0115, Cook County Cross Ex. 35, Cook County Initial Brief at 18, (*See Appendix to this Brief*). Moreover, if for the sake of argument, we used the same method as ComEd to create a rate of low-level waste escalation for the proposal in this docket, 1/3 of 9.19% would be 3.07%. ICC Docket No. 00-0361, ComEd Ex. 8 at 8; Tr. 1077. Using the 1999 Rider 31 calculation, the overall escalation rate would be 3.0%.⁶

ComEd arbitrarily deviates from NUREG 1307 to calculate waste burial escalation, i.e., 22.44%. Mr. Berdelle fails to follow the terms of NUREG 1307 and ComEd's own Rider. Calculation of waste burial escalation minus the South Carolina tax is nothing more than ComEd's creation resulting in an inflated escalation rate.⁷ ComEd has attempted to pick and choose among cost components of an index that it suggested using in the first place.

In ComEd's 1997 petition for a decommissioning expense adjustment, ComEd provided three reasons to justify use of NUREG 1307 as a source for waste escalation:

⁶ See ICC Docket No. 99-0115, ComEd Ex.1, page 2, where "E= Decommissioning escalation factor, defined as $[1 + (0.378 \times W + 0.356 \times O + 0.266 \times B)]^n$ ", (*See Appendix to this Brief*)

⁷ On cross-examination, Mr. Berdelle testified that he had contacted the NRC to find out why the South Carolina tax was not known and measurable from NUREG 1307. He also testified that he only knew the amount of the South Carolina tax because of his knowledge of ComEd's monthly waste shipments to South Carolina. ICC Docket No. 99-0115, Tr. 1094-1095.

- (1) NUREG 1307 is the only waste burial index of which ComEd is aware;
- (2) the cost of low-level waste burial estimated by ComEd's witness Mr. Jene Vance is comparable to the current burial rate at Barnwell;
- (3) it is reasonable to assume that the cost drivers for low-level waste burial at Barnwell (i.e., labor, maintenance, environmental, etc.) should be similar to the cost drivers at an Illinois facility.

ICC Docket No. 99-0117.

The record in this docket indicates that ComEd has not abandoned these reasons for use of NUREG 1307 to calculate escalation because (1) ComEd still maintains that NUREG 1307 is the only verifiable index in which to estimate low-level waste disposal costs. ICC Docket No. 99-0115, ComEd Ex. 11 at 8, Tr. 1055; (2) ComEd adopts Mr. Vance's 1996 cost estimate for low level waste burial in this docket; ICC Docket No. 99-0115, Tr. 1054; ICC Docket No. 00-0361, ComEd Ex. 12 at 25, TSL2 at 6-2; and (3) ComEd still maintains that Barnwell is a reasonable proxy. ICC Docket No. 99-0115, Tr. 1055. ICC Docket No. 00-0361, ComEd Ex. 8 at 7-9.

ComEd loosely uses the terms "surcharge" and "waste disposal tax" in the context of low-level waste as if they are comparable or interchangeable. Tr. 1056. The law is clear that a waste disposal tax is not a surcharge in the context of low-level radioactive waste. "Surcharge" and "waste disposal tax" are distinctly different and legally defined terms.

A waste disposal tax is not legally or technically a surcharge for waste burial. NUREG 1307 is based on the Low-level Radioactive Waste Disposal Act, 42 U.S.C.A. Section 2021 a-j (West 1995) and its 1985 amendments. This Act permitted surcharges in addition to fees and surcharges generally applicable for disposal of low-level radioactive waste in the regional

disposal facility involved. 42 U.S.C.A. Section 2021e(d)(1). In 1985, according to the legislative history of the Act, these surcharges were imposed to: "(1) provide incentives for unsited regions and States to develop new facilities, (2) encourage volume reduction by unsited regions and States and (3) compensate sited States for excluding access." Low-Level Radioactive Waste Policy Amendments of 1985, H.R. No. 99-240 at 3012 (1985). Therefore, an increasing schedule of surcharges was imposed on wastes in states that used facilities from out of state. 42 U.S.C.A. Section 2021 e(d)(1) These surcharges were no longer operative after 1993 because states could refuse to accept waste from other states not in a compact. 42 U.S.C.A. Section 2021 e(d)(2)(C).

The waste disposal tax imposed by South Carolina is not comparable to this surcharge. South Carolina specifically defines "surcharge" as the per cubic foot charge required by 42 U.S.C.A. Section 2021 e(d)(1). S.C. Code Ann. Section 13-7-20 (Law Co-op. 1996). South Carolina's waste disposal tax is governed by S.C. Code Ann. Section 48-48-140(A) (Law Co-op. 1996) which requires that the tax be imposed for each cubic foot of waste disposed in South Carolina. Unlike surcharges, South Carolina's tax is imposed equally on in state and out of state low-level waste depositors. *Id.* Moreover, this tax is imposed by multiplying the amount of the tax imposed on a cubic foot by the cubic foot amount specified in the permits required by the South Carolina Department of Health and Environmental Control and submitted at the time of delivery of the waste. S.C. Code Ann. Section 48-48-140(E).

The South Carolina tax is not a surcharge within the meaning of Rider 31. Every party agrees that Rider 31 requires use of NUREG 1307 to determine waste burial escalation rate.⁸

⁸"B = Burial escalation rate, based on the average annual rate of escalation (excluding surcharges) for the most recent three years for waste burial at the Barnwell facility contained in the latest revision to NRC NUREG-1307." ICC Docket No. 99-0115, ComEd Ex. 1, page 2, (*See Appendix to this Brief*).

ICC Docket No. 99-0115, ComEd at Ex. 11 at 8, ICC Staff Ex. 3 at 18. Accordingly, any attempt to define surcharge other than as determined by NUREG 1307 is legal error and blatantly contrary to ComEd's position that NUREG 1307 is the only *objective* index to project waste burial escalation. ICC Docket No. 99-0015, Tr. 1055. The only index is Table 2.1 of NUREG 1307, which includes the South Carolina Tax. ICC Docket No. 99-0115, Cook County Cross Ex. 33, Table 2.1.

Using this index and Mr. Berdelle's calculations, the escalation rate should be as follows:

(wages)	3.28% x 37.8%	=	1.24
(other)	2.66% x 35.6%	=	0.947
(waste burial)	26.6% x 9.19% ⁹	=	2.445
Escalation Rate		=	4.63%

ICC Docket No. 99-0115, ComEd Ex. 11 at 11; Cook County Cross Exs. 33, 35.

3. No Further Ratepayer Contributions Are Necessary With Use Of The Appropriate Escalation Rate

As AG witness Dave Effron testified, the Commission should adopt assumptions that are balanced, reasonable, and equitable. Under such assumptions, future decommissioning costs are adequately funded, and there is no need for further collections from customers subsequent to the transfer of the nuclear plants to Exelon Genco. Peoples Exs. 1.0, 2.0, 2.1. With reasonable assumptions, even if the Commission adopted an escalation rate of 4.11 % or 4.63%, there is still no need for further ratepayer collections.

ComEd is proposing the same cost of service in this docket as it proposed as its final position in ICC Docket No. 99-0115. However, upon transfer of the units to Genco, the

⁹Source – ICC Docket No. 99-0115, Cook County Cross Ex. 35, (*See Appendix to this Brief*).

Commission loses all such authority over decommissioning collections because Genco will not be under the Commission's jurisdiction. ICC Staff Ex. 2 at 6. Therefore, a determination of whether ComEd's proposal is balanced, reasonable and equitable must turn on an analysis of the adequacy of the amounts in the decommissioning trusts being transferred in relation to the expected expenditures for decommissioning. ComEd's proposal should be compared to the prospective collection of decommissioning charges from customers necessary to fund all reasonable costs and expenses of decommissioning. If ComEd's proposal results in over collection of decommissioning charges from customers, then the proposal is detrimental to customers and not just and reasonable as required by the PUA. 220 ILCS 9-201(c).

Accordingly, the collection of decommissioning charges from customers should continue just as long as necessary to fund all reasonable costs and expenses of decommissioning and no longer. Peoples Exs 1.0, 2.0, 2.1, CUB/City Exs. 1.1,1.2; Coalition Exs. 1.0, 2.0; IIEC Ex. 1.

Accepting ComEd's assumption that ratepayers are responsible for 100% of decommissioning costs, the Commission must acknowledge that there is significant uncertainty with respect to decommissioning costs. ComEd suggests that the only risk is that costs will be more than the current expected levels. ComEd fails to acknowledge the two-sided nature of risk by failing to discuss the possibility that decommissioning costs will be lower than estimated. *Id.* Therefore, the Commission should not assume that ComEd provides an unbiased estimate. The Commission must make an alternative assessment to insure that ratepayers only pay just and reasonable costs. 220 ILCS 9-201(c). In addition, for public policy reasons, the Commission should assure just and reasonable decommissioning funding, for example, in case of bankruptcy. In other words, there is an underlying need to have the funds available for decommissioning. Tr. 1365.

Ultimately, ComEd's proposal should not impact either the ultimate procedure by which ComEd decommissions the plant, or the dollar amount of expenditures ComEd makes in decommissioning the plants, or the investment strategy ComEd uses for the decommissioning fund. It is unlikely that ComEd could engage in significantly different practices with respect to the physical decommissioning of its plants merely because the plants are owned by an affiliate. The only way the Commission can determine just and reasonable costs for decommissioning is to balance the interests of investors and customers by adopting balanced and reasonable assumptions. Under such assumptions, future decommissioning costs are adequately funded. Peoples Ex. 1.0 at 25-26.

As AG witness Effron has shown reasonable assumptions include the exclusion of the contingency factor, and consideration of the effects of license extensions and removing site restoration costs. The evidence shows that these assumptions are reasonable. Peoples Exs. 1.0, 2.0, 2.1.

a. Contingency Factor

First, the decommissioning costs presented by ComEd in this case are based on site-specific studies. Although the cost estimates used by the NRC in developing its formulas for minimum funding include contingency allowances, this does not necessarily mean that contingency allowances are needed if site-specific studies are used to develop estimated costs of decommissioning. The site-specific studies reduce the potential for additional costs above the costs considered in an estimate that is to be used generically for decommissioning cost projections at different sites. Peoples Ex. 1.0 at 9-15.

Second, contingency allowances are too speculative. As the Commission noted in its Order in ICC Docket No. 86-0125 (Illinois Power, July 15, 1987), the intent in establishing an annual decommissioning provision is "to provide for decommissioning costs which are sufficiently certain to be incurred and reasonable in amount." Contingency allowances are not sufficiently certain to be incurred to the extent that they should be included in the estimate of decommissioning costs.

In ICC Docket No. 94-0065, the Commission stated that "use of site specific studies reduces the need for inclusion of a contingency factor", and that it was unable to find that the Company's inclusion of an add-on 'contingency factor' of 25% (or any other percentage) in nuclear decommissioning costs satisfies the requirements of certainty and reasonableness of amount" ICC Docket No. 94-0065, Order at 68-69.

Third, because the Commission approved the use of a contingency factor in ICC Docket No. 97-0110 does prevent the Commission from excluding it in this case. As a general rule, the Commission has the power to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or same situation in a previous proceeding. *Mississippi River Fuel Corp. v. Illinois Commerce Commission*, 1 Ill.2d 509, 513, 116 N.E. 2d 394 (1953). However, that rule has a counterpart, which holds that although the Commission is free to depart from past practices it cannot do so arbitrarily or capriciously. *City of Chicago v. People of Cook County*, 133 Ill. App. 3d 435, 478 N.E. 2d 1369 (1985). This means that if the Commission has decided to take action inconsistent with the way it acted in the past, it must, at a minimum explain the reasons for the difference. In other words, a consistent and long-standing practice

cannot simply be overlooked. *Peoples Energy Corp. v. Illinois Commerce Commission*, 142 Ill.App.3d 917, 929, 429 N.E.2d 551 (1st Dist. 1986). Rather, it must be addressed, distinguished and reconciled in some fashion in the Order. Otherwise, it is subject to a charge of arbitrary and capricious conduct.

In this case, the evidence amply describes and shows why the contingency should be excluded. When the Commission decided ICC Docket No. 99-0117, ComEd's nuclear units would be part of regulated utility operations until their time of retirement. The annual provision for decommissioning would be subject to a continuing fine-tuning process. The annual provision for decommissioning could be modified as more information became available, and ratepayers, as well as investors, would be protected. Now, with the nuclear units, and the associated decommissioning trusts being transferred to a non-utility affiliate, outside the jurisdiction of the Commission, that perpetual fine-tuning process is no longer available. Therefore, contingency allowances for unspecified costs should not be included in the estimates for decommissioning at this time. Peoples Exs. 1.0, 2.0, 2.1.

b. License Extensions

Almost every witness, except for ComEd, agrees that the Commission should consider license extensions. ICC Staff Ex. 2.0, Peoples Exs 1.0, 2.0, 2.1; CUB/City Exs. 1.1, 1.2; Coalition Exs. 1.0, 2.0; IIEC Ex. 1. License extensions do not decrease the present value cost to decommission a plant. The savings come in the form of a lower revenue requirement to fund the trusts because of additional time for earnings to accumulate in the trust funds. Staff Ex. 2.0 at 8.

The evidence has shown that ComEd has begun an analysis of license renewal for Dresden and Quad Cities units. Peoples Ex. 1.0 at 20, CUB Ex. 1.2 at 6. ComEd would not have begun an analysis of license renewals unless there was some reasonable possibility that the process would ultimately result in the renewal of those licenses. *Id.* Therefore, it is reasonable to expect that ComEd ultimately will seek to submit applications to the NRC to extend the operating lives of its ten remaining nuclear plants. It is also reasonable to expect that the NRC would approve such requests if ComEd continues to properly maintain its nuclear units, if it operates those units in a conservative manner, and if the ComEd submits license renewal applications that satisfy NRC requirements. For this reason, the Commission should base its decommissioning collection policies on the assumption that the operating lives of each of the Company's nuclear plants will be extended beyond the expirations of their existing NRC licenses. ICC Staff Ex. 2.0, Peoples Exs 1.0, 2.0, 2.1; CUB/City Exs. 1.1, 1.2; Coalition Exs. 1.0, 2.0; IIEC Ex. 1.

c. Site Restoration

The Commission's own expert witness William Riley testified that with respect to ComEd, if the Commission allowed site restoration to be included in the cost of service, the cost of service would be monitored and adjusted until the units are decommissioned. Therefore, the Commission could reasonably be assured that there would be adequate funds to perform site restoration and would have at least some authority to ensure that site restoration *would be* performed. Upon transfer of the units to Genco, the Commission loses all such authority because Genco is not under Commission jurisdiction. In fact, even in ComEd's revised proposal, any funds provided now for site restoration would only help Genco meet its NRC funding

requirements for radiological decommissioning. It is only reasonable and appropriate to exclude this expense. ICC Staff Ex. 2 at 6.

Accordingly, when the Commission takes all these reasonable assumptions into account – contingency factor, license extension and site restoration - and using a 4.11% or a 4.63% overall escalation rate, the evidence shows that ratepayers still no longer have to provide any additional funds. Peoples Exs 1.0, 2.0, 2.1; CUB/City Exs. 1.1,1.2; Coalition Exs. 1.0, 2.0; IIEC Ex. 1. According to AG witness Effron, an escalation rate of 4.63% with the reasonable assumptions as discussed above will result in excess decommissioning funds of *no less than \$60 million*. Peoples Ex. 2.1, Schedule DJE-1B.

4. The Commission Should Adopt A Higher Earnings Rate On Decommissioning Trust Funds

The Commission has adopted an after-tax earnings rate of 7.36 percent since 1994 for decommissioning trust funds. Tr. at 1021. The earnings rate should be increased by using the weighted average of the historical return of stocks and bonds. CUB Ex. 1.1 at 11.

5. The Commission Should Consider The Possibility That The Operating Licenses Of The Nuclear Units Could Be Extended

ComEd has stated that it has begun an analysis of license renewal for the Dresden and Quad Cities plants. Peoples Ex. 1.0 at 20; CUB Ex. 1.2 at 6. Life extension for the nuclear units would increase the amount of decommissioning funds available, and reduce the need for collecting decommissioning funds from ratepayers. In this case, a larger share of the decommissioning liability should be allocated to Exelon Genco and less to ratepayers.

The possibility that ComEd may extend the life of some of the company's nuclear units is substantial. The NRC has approved applications of Baltimore gas and Electric to extend the life

of two of its nuclear units. CUB Ex. 1.2 at 10. One other plant, similar in design to ComEd's Dresden and Quad Cities units, have applications for life extension which are currently under review by the NRC. Other companies with nuclear units similar in design to ComEd's have announced dates by which they will file applications for life extension.

The life extension of the Dresden and Quad Cities units would have a significant impact on the amount of decommissioning monies available in the trust funds. The increase in excess funding for a twenty-year license extension for the Dresden plant is over \$100 million for each unit, and for the Quad Cities plant is over 80 million for each unit. The excess funding for the operating units as of the end of 1999 therefore increases by \$420 million. Peoples Ex. 1.0 at 20.

6. The Commission Should Consider The Possibility That ComEd May Delay The Dismantling Of Nuclear Units

As an unregulated subsidiary, Exelon Genco will have an incentive to defer costs into the future. Decommissioning funds will have additional time to accumulate earnings. Genco will gain approximately \$1.2 billion if dismantlement is delayed by 20 years. CUB Ex. 1.1 at 13-14. Randall Speck, who has represented ComEd as an attorney in ICC Docket No. 99-0115, admitted that the information upon which ComEd relies in seeking life extension for the nuclear units should be a consideration to the Commission for establishing decommissioning policy in this case. Tr. at 243.

7. The Commission Should Not Include Contingency Factors Recommended By ComEd In Estimating Decommissioning Expenses

The use of contingency allowances in estimating decommission expenses is inappropriate in this case. Contingency factors are not necessary when, as in this docket, site specific cost

studies have been performed. Site specific studies are by definition particular to the nuclear plant being decommissioned, and reduce the level of uncertainty in cost estimating. Peoples Ex. 1.0 at 10. Contingency factors are speculative, and conflict with the Commission's intention that decommissioning costs should be "sufficiently certain to be incurred". *Id.* at 12. Contingency factors have been used to protect future ratepayers and investors as new information became available. After the deregulated Exelon Genco is created there is no opportunity to fine-tune the process to assure equity between ratepayers and investors. *Id.* at 13.

8. The Commission Should Eliminate The Cost Of Nonradiological Decommissioning From ComEd's Cost Estimate

ComEd last requested recovery for nonradiological decommissioning costs in ICC Docket No. 94-0065. The ICC determined that the record from that case demonstrated that ComEd should investigate alternative uses for nonradiological structures:

The burden is on the Company to prove that it will not re-use old structures. The Company has failed to convince the Commission that nonradioactive structures will not be used in the future... The Commission was persuaded by evidence in the record that potential changes in regulations may encourage use of nonradioactive portions of facilities, Order at 58, ICC Docket No. 94-0065.

In the 1994 decommissioning case ComEd testified that:

It is unlikely the structures will be re-used, old structures may not suit new equipment and systems, the structures would be too old and worn, the condition of the structures will not be known for some time, and use of such structures might be more expensive than their demolition, Order at 57, ICC Docket No. 94-0065.

ComEd is presenting the very same arguments in the current decommissioning case. This was not adequate for the Commission in 1994 and it is not adequate today. ComEd went no

further in the current case than in 1994 in fulfilling its burden that it will not re-use old structures. ComEd provided no such study in 1994, and the company provided no such study in the current decommissioning case.

Witness Thayer testified that his definition of decommissioning “has always been the complete removal of the power plant”. ICC Docket No. 99-0115, Tr. at 423. This definition is based upon his experience, yet is not supported by any statutory or regulatory provision, which only require the protection of health and safety, ICC Docket No. 99-0115, Cook County Cross Ex. 3, TSL-9 Sec. 1, pp.1-2, *See also* Tr. at 589-590. Thayer theorized that removing environmental hazards such as lead paint and asbestos would render buildings unusable and “make reinvestment prohibitively high”, ICC Docket No. 99-0115, Tr. at 428. This might be a sound theory, but it must be backed up by analysis of specific structures. Thayer admitted that he had not performed such an analysis for ComEd’s plants. ICC Docket No. 99-0115, Tr. at 428. Even for the portion of the plant which is contaminated with radiation, cleanup levels are adjusted based upon the intended use of the ComEd sites, of which there are multiple possibilities. ICC Docket No. 99-0115, Cook County Cross Ex. 5, Tr. at 437. Mr. Thayer relies, in part, on his experience in decommissioning at the Yankee Rowe plant to justify non-radiological demolition of buildings and structures at ComEd plants. ICC Docket No. 99-0115. ComEd Ex. 3 at 15. Management at Yankee Rowe elected to demolish structures such as warehouses, security buildings, and gatehouses without looking at alternatives uses, according to Mr. Thayer. “The plans have always been to demolish the structure”. ICC Docket No. 99-0115. Tr. at 451. Yankee Atomic Electric Company did conduct a study in 1993 to evaluate reuse of the site. Cook County Cross Ex. 11. ComEd provided neither the methodology nor details of the

study, but only the conclusion. *Id.* ComEd could have conducted a similar study for its own plants, but chose not to.

TLG Services, Inc. did produce a Site Restoration Cost Estimate for the ComEd plants, TSL-9. TLG recommended demolition for structures such as administration buildings, visitors centers and warehouses. These decisions were not based upon regulatory or statutory criteria, however, because if the buildings were cleaned out and protected by security, they could remain intact and public health and safety would be protected, ICC Docket No. 99-0115, Cook County Cross Ex. 19, Tr. at 591-596. The decision to demolish is not a criterion which is part of NRC decommissioning guidelines. *See* TSL-9, Sec. 1, p.1. Therefore, these costs are not properly included in the decommissioning cost estimates and should be removed.

Despite directions from the Commission in 94-0065, ComEd did not investigate alternative uses of buildings, ICC Docket No. 99-0115, Cook County Cross Ex. 20, 21, 36, 37, Tr. 597-602, 1105-6. The burden is still on ComEd to prove that the Company will not re-use structures in the future. ComEd's request for nonradiological decommissioning costs should be denied.

9. There Is No Basis For The Proposed Six-Year Continuing Obligation Period For Rider 31 Collections

ComEd proposes that the decommissioning collections continue for six years after the nuclear stations are transferred to Genco. This period corresponds with the term of the PPA. During the first four years when the price of electricity is fixed, ratepayers will not benefit because they will pay the same base rates with or without the transfer of the nuclear stations and the PPA. Only ComEd benefits from fixed operating costs during this period. IIEC Ex. 1 at 11.

During the fifth and sixth years, ComEd may seek a rate increase if market prices increase.

Ratepayers would see no benefit under this scenario. *Id.* at 12.

10. The Commission Should Prohibit ComEd From Passing Spent Fuel Storage Costs To Its Ratepayers And Require ComEd To Remove That Amount From Its Cost Estimates

The Commission determined in the 1997 Rider 31 proceeding, ICC Docket No. 97-0110, that ComEd's request for costs for Independent Spent Nuclear Storage Installation (ISFSI) was premature. Order at 9, ICC Docket No. 97-0110. The Commission determined that:

After the Court has resolved the issue of the Department of Energy's (DOE) responsibilities under the Nuclear Waste Policy Act (NWPAct), ComEd may petition the Commission for the recovery of these costs during its next rider 31 proceeding. *Id.*

The legal issues regarding DOE's liability for ISFSI costs remain unresolved, and the Commission should again find that ComEd's request for reimbursement of these costs is premature.

The Commission in ICC Docket No. 97-0110 was awaiting a resolution of the decision in Indiana Michigan Power Company v. Dept. of Energy, 88 F.3d 1272 (D.C. Cir. 1996) which held that the NWPAct created an obligation in DOE to accept spent nuclear fuel. *Id.* at 1277. Utilities sought a writ of mandamus requiring DOE to comply with this obligation in Northern States Power Company et.al. v. United States, 128 F.3d 754 (D.C. Cir. 1997).

ComEd's testimony is incomplete and misleading, omitting available remedies. Mr. Lyster claimed that the Court in Northern States declined to give the petitioners any relief beyond a writ precluding DOE from contending that its failure to accept spent fuel was an

“avoidable delay”. ICC Docket No. 99-0115, ComEd Ex. 10 at 4. The Court declined the broad writ sought by petitioners because the parties had already had a remedy available to them to resolve the dispute. We hold that the Standard Contract between DOE and the utilities provides a potentially adequate remedy if DOE fails to fulfill its obligations by the deadline, and thus do not grant in full the writ requested by petitioners, Northern States, 128 F.3d at 755.

In accordance with the NWPA, DOE adopted a Standard Contract, 10 C.F.R. 961.11, which proves for the disposal of spent nuclear fuel in return for the payment of fees. The Standard Contract provides a dispute resolution mechanism for dealing with delayed performance. Article IX of the Standard Contract provides that, in the case of DOE’s “avoidable delay”, “the charges and schedules must be equitably adjusted to reflect additional costs incurred by the other party”. *Id.* In the alternative, Article XVI specifies that “any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer...” *Id.* This is the remedy that contradicted Mr. Lyster’s testimony. ICC Docket No. 99-0115, Tr. at 925. ComEd intentionally decided not to submit the dispute to the Contracting Officer despite the Court’s order that the parties proceed with contractual remedies to resolve the spent fuel disposal dispute. ICC Docket No. 99-0115, Tr. at 934.

ComEd has filed a claim before the Court of Federal Claims to enforce the Northern States decision without resorting to contractual remedies. Northern States Power Company also filed a complaint in the Court of Federal Claims, Northern States Power Company v. United States, 43 Fed. Cl. 374 (1999). Northern States claimed that the Standard Contract was not

adequate to cover the company's fuel storage dispute which is so extended in duration and for which fulfillment of the contract is not expected to be completed for many years. The Court rejected these arguments and granted the federal government's motion to dismiss. *Id.* at 382. The Court concluded that "plaintiff must pursue its claims through the administrative remedies established in the Standard Contract", *Id.* at 388. Northern States appealed that decision, which was consolidated with other appeals from utilities' federal claims cases. The United States has obtained a stay on proceedings in the Court of Federal Claims pending the outcome of proceedings in the D.C. Circuit for the United States Court of Appeals, 99-5096, ICC Docket No. 99-0115, ComEd Ex. 10 at 8.

ComEd explored other options for resolving this dispute while declining to take advantage of available (and Court-ordered) remedies under the Standard Contract. ComEd, in cooperation with other utilities, has been meeting with DOE "to explore opportunities to move forward on the high-level waste issue", ICC Docket No. 99-0115, Tr. at 937. Timothy Smith, a lobbyist hired by ComEd to monitor and consult on the spent fuel disposal issue, ICC Docket No. 99-0115, Tr. at 943, 954, Cook County Cross Ex. 25, expresses, in April, 1999 ComEd's position that "we (ComEd) want to applaud your (DOE) initiative and trust that you are committed to getting the current (spent fuel) issue resolved and moving ahead on the final efforts required to determine the suitability of Yucca Mountain... We believe the so-called take title solution is a solid starting point... We believe the Senator's (Bingaman) draft provides a solid foundation for legislation. ICC Docket No. 99-0115, Tr. at pp 939-941. Mr. Smith further expresses the utilities' optimism on reaching an agreement with DOE, ICC Docket No. 99-0115, Tr. at 945. These positions were adopted by ComEd, ICC Docket No. 99-0115, Tr. at 957-958.

Mr. Smith, in a June 1999 correspondence with ComEd, Cook County Cross Ex. 26, expresses that DOE has made an offer to pay spent fuel costs on an "incremental basis" that they would take title to, ICC Docket No. 99-0115, Tr. at 969. Mr. Lyster's notes laid out the utilities' and DOE's needs to resolve the spent fuel dispute and admitted that these needs could be a basis for agreement, ICC Docket No. 99-0115, Cook County Cross Ex. 26, Tr. at 972. It is not clear if these negotiations have been conducted within the framework of the NWPA Standard Contract, as ordered by the Court. It is clear, however, that these negotiations could result in an agreement which would preclude charging Illinois ratepayers for spent fuel costs.

Next, ComEd also relies on a definition slight-of-hand to recover spent fuel costs from Illinois ratepayers by using wet fuel storage at Zion and claiming that the configuration is not an ISFSI. An ISFSI is defined as follows (eff. Feb. 1, 2000):

... a complex designed and constructed for the interim storage of spent fuel and other radioactive materials associated with spent fuel storage. An ISFSI which is located on the site of another facility licensed under this part or a facility licensed under part 50 of this chapter and which shares common utilities and services with such a facility or is physically connected with such other facility may still be considered independent, 10 C.F.R. 72.3.

The basis of an ISFSI is that it operates independently of nuclear plant facilities. ComEd could configure a wet fuel storage installation at Zion that would meet the ISFSI definition, ICC Docket No. 99-0115, Tr. at 485-486, 994. In an attempt to circumvent the Commission's previous decision that an ISFSI should not be included in Rider 31 by intentionally designing a wet fuel storage system at Zion that does not meet this definition. ComEd is instead including wet fuel storage as maintenance costs and combining these with other decommissioning costs. TSL-6, Table C-1, Appendix C, p.2. The Commission should not allow costs of the wet fuel storage installation at Zion to be recovered.

ComEd is prematurely attempting to recover spent fuel costs from ratepayers. The litigation cited above in the Federal Court of Appeals and the Federal Court of Claims has not been resolved. An appeal to the U.S. Supreme Court is possible. ComEd has contractual remedies available through the NWPA Standard Contract to resolve the spent fuel dispute. They have decided not to pursue these remedies. ComEd has pursued negotiations with DOE upon which Mr. Lyster has provided a basis for agreement. ComEd has filed for recovery of these costs through Rider 31, a strategy that they pursued while negotiating with DOE, ICC Docket No. 99-0115, Cook County Cross Ex. 26, Tr. 979-980. Even if the ICC denies ISFSI costs in this Rider, ComEd is attempting to avoid this decision by designed wet fuel storage at Zion which does not fit the ISFSI definition and is included as maintenance costs in decommissioning.

The outcome of the spent fuel dispute with DOE is no less uncertain than when the ICC denied these costs in ICC Docket No. 97-0110. The ICC should again deny these costs until the spent fuel litigation has concluded.

11. The Commission Should Deny ComEd's Request For Additional Decommissioning Funds

There is currently an excess of funds in the trust accounts as of the end of 1999 to complete decommissioning for all of ComEd's nuclear units. There is currently an excess of \$168 million in the trusts for ComEd's operating units. This presumes a 4.11% escalation rate, and a return of 7.4% during the plants' dismantlement period. Decommissioning costs are incurred over a number of years after license expiration, and the amounts in the funds will earn the return. The amounts in the decommissioning funds will exceed the ComEd's estimated costs

for decommissioning, even assuming no future contributions to the funds. Peoples Ex. 1.0 at 15-17.

There is currently a \$253 million shortfall for the non-operating units (Dresden 1, Zion 1&2). ComEd can eliminate this deficit, however, by contributing monies collected prior to establishment of the trust funds in 1989, monies collected in 2000 that were due in 1999, and monies due through the end of 2000. There is currently an excess of \$109.9 million in the trust funds over that required for decommissioning the operating and non-operating units, assuming no license extensions. *Id.* at 19. If it is assumed that the operating licenses for the Dresden and Quad Cities plants are extended by twenty years, then the available decommissioning funds would exceed costs by \$529 million.

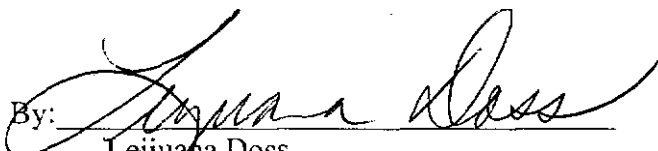
V. CONCLUSION

For all the above-stated reasons, Cook County requests this Commission to deny ComEd's revised decommissioning proposal.

Respectfully submitted,

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Dated: September 20, 2000

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**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission
On Its Own Motion

-vs-

Commonwealth Edison Company

Petition for approval of a revision to decommissioning
Expense adjustment Rider to take effect on transfer of
ComEd's generating stations.

Docket Nos. 00-0361

NOTICE OF FILING

PLEASE TAKE NOTICE that on this date, September 20, 2000, we have filed with the Chief Clerk of the Illinois Commerce Commission the enclosed Initial Brief of the People of Cook County in the above-captioned docket.

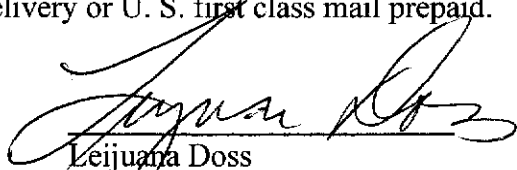
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CERTIFICATE OF SERVICE

I, LEIJUANA DOSS, hereby certify that a copy of the enclosed Initial Brief of the People of Cook County was served on all parties on the attached list on the 20th day of September 2000, by hand delivery or U. S. first class mail prepaid.


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